UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DAVON, INC., Plaintiff,	)	
vs.	)	TH93-198-C-T/H
DONNA E. SHALALA, Secretary, United States Department of Health and Human Services, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, Defendants.	)	

Order of Judgment

For the reasons stated in the entry accompanying this order, Plaintiff Davon, Inc.'s motion for summary judgment is hereby **DENIED** and Defendants Donna E. Shalala and the United Mine Workers of America Combined Benefit Fund's cross-motion for summary judgment is hereby **GRANTED**. Accordingly, the court finds that Plaintiff's challenge to the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 must fail. **JUDGMENT** is hereby entered in favor of Defendants and against Plaintiff Davon, Inc.

ALL OF WHICH IS ORDERED this 4th day of April 1995.

/s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court

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Entry Regarding Defendant's Motion to Transfer Venue and the Parties' Cross-Motions for Summary Judgment

This matter comes before the court upon the motion of Defendant United Mine Workers of America Combined Benefit Fund ("Combined Fund") to transfer venue under 28 U.S.C. § 1404(a) and upon the cross-motions of the parties for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The court, having considered the motions and the submissions of the parties, finds that Defendant Combined Fund's motion to transfer should be **DENIED**, that Plaintiff Davon, Inc.'s ("Davon") motion for summary judgment should be **DENIED** and that Defendants Donna E. Shalala (the "Secretary") and the Combined Fund's cross-motion for summary judgment should be **GRANTED** for the reasons set forth below.

This case is effectively identical to the companion case of *Templeton Coal Co., Inc. v. Shalala*, in which the court entered summary judgment this date. *See* TH 93-158-C-T/H, Memorandum Entry Regarding Cross-Motions for Summary Judgment entered April 4, 1995 [hereinafter *Templeton Coal*]. As it relates to the instant question, the court finds that Davon is situated identically to Plaintiff Templeton Coal in that case. See *Templeton Coal* at 3, 11-12. Accordingly, the court's entry in *Templeton Coal* will control this case and will be extensively referred to *infra* in support of the court's ruling.

I. Background Facts and Procedural History

Davon is an Ohio corporation which maintains its corporate headquarters in Columbus, Ohio. Davon operates six corporate divisions, five in Ohio and one in West Virginia, Kentucky and Ohio. Presently, Davon's principal business involves the mining and sale of limestone aggregates, ready mix concrete and the manufacture and sale of concrete block and pre-cast concrete products.

For a period of time ending January 28, 1954, the New York Coal Company[1] ("N.Y. Coal"), a Maine corporation, was engaged in the business of mining coal.[2] On that date, N.Y. Coal sold its entire coal mining business to

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[1] Plaintiff's brief also refers to its predecessor corporation as the New York Coal Sales Company. (Mem. in Supp. of Pl.'s Mot. for Summ. J. at 2.)

[2] The record does not reflect the exact period of time that N.Y. Coal was engaged in the coal mining business. The record, though, is clear that N.Y. Coal was engaged in the coal mining business no later than the mid- to late-1940s.

Sunnyhill Coal Company of Pittsburgh, Pennsylvania.[3] Neither N.Y. Coal or any of its successor corporations have engaged in the business of mining coal since that time. In 1957, N.Y. Coal officially changed its name to Davon, Inc. Subsequently, on September 7, 1979, the original Davon (a Maine corporation) and the present Davon (an Ohio corporation), merged with the present Plaintiff as the surviving corporation.

In the instant suit, Davon challenges the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat 2776, 3036-3056 (codified at 26 U.S.C. §§ 9701 to 9722) ("Coal Act"), under the Due Process and Takings Clauses of the Fifth Amendment to the United States Constitution.[4] U.S. CONST. amend. V. In 1993, the Secretary assigned Davon responsibility under the Coal Act to pay premiums for prior coal mine employees of N.Y. Coal. The Secretary found that N.Y. Coal was a signatory to a National Bituminous Coal Wage Agreement ("NBCWA") and was, therefore, liable for premiums under the Act.[5] For the year beginning

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[3] Sunnyhill has since sold these operation to Peabody Coal Company.

[4] For a detailed history of the Coal Act and the labor agreements upon which it was built, see *Templeton Coal* at 2-14.

[5] Davon contests several facets of the factual background under which the Secretary seeks to hold them liable for Coal Act premiums. The court notes that these disputes have nothing to do with the underlying constitutionality of the Coal Act as it relates to Davon. For example, Davon asserts that it has no knowledge that it was ever a signatory to any NBCWA (although it does note that if it was ever a signatory to an NBCWA, it participated in no agreement after the 1952 NBCWA). (Mem. in Supp. of Pl's Mot. for Summ. J. at 3.) This

October 1, 1993, Davon was assigned 92 beneficiaries, resulting in an assigned premium of $327,428.80.

II. Combined Fund's Motion to Transfer Venue

As a preliminary matter, the court must resolve the Combined Fund's motion to transfer venue in this action under 28 U.S.C. § 1404(a). Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In some measure, section 1404(a) is a codification of the doctrine of *forum non conveniens*, but the court's discretion under the statute is somewhat more broad. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Section 1404(a) gives the court discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The court considers the three factors specified – the convenience of the parties, the convenience of the witnesses, and the interest of justice – in light of all the circumstances of the case. *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 & n.3 (7th Cir. 1986). The relative weight to be accorded each factor is not specified in section 1404(a), rather "[t]he weighing of factors for and against transfer

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dispute, like all other factual disputes raised by Davon, may be raised and resolved within the framework of the Coal Act and have absolutely nothing to do with the underlying constitutionality of that Act.

necessarily involves a large degree of subtlety and latitude, and, therefore, is committed to the sound discretion of the trial judge." *Id.* at 219.

With respect to the convenience of the parties, Plaintiff's choice of forum is entitled to some weight. *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364, 368 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979). In its entry of December 6, 1993, the court has previously found that venue in the Southern District of Indiana is proper. Accordingly, the court finds that this factor weighs in favor of retaining venue.

With respect to the convenience of the witness, the court finds this factor to be relatively neutral. Because the court intends to dispose of this action on summary judgment, no witnesses will be called. Accordingly, the convenience of witnesses plays no part in this decision.

Finally, the court finds that the interests of justice also weigh in favor of retention of venue. The relevant factors to consider include:

> (1) the relative ease of access to sources of proof;
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> (2) the amenability of unwilling witnesses to service of process;
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> (3) the cost of attendance at trial of willing witnesses;
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> (4) the relation of the community in which the courts and jurors are required to serve to the occurrence at issue in the litigation;
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> (5) the accessibility of premises involved in the litigation;

> (6) the relative congestion of the court dockets and prospects for earlier trial; and
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> (7) in a diversity case, the relative familiarity of the courts with the state law supplying the applicable rules of decision.

See Zalutsky, Pinski & DiGiacomo, Ltd. v. Kleinman, 747 F. Supp. 457, 462-63 (N.D. Ill. 1990). First, the court finds that all of the necessary sources of proof are already before the court. Second, the court finds that factors two through four are irrelevant for the reasons stated above. Third, the courts finds that factors five and seven are equally irrelevant. Finally, the courts finds that the sixth factor weighs in favor of retention of venue because the court is convinced that the courts of the Southern District of Ohio are faced with similarly congested dockets. Furthermore, because this court's ruling in *Templeton Coal* has significantly increased the courts familiarity with the issues in this case, the court finds that the interest of justice is best served by retention of this matter in this court. Therefore, the court finds that the relative factors weigh in favor of retaining venue over this case. Accordingly, the Combined Fund's motion seeking transfer of venue under 28 U.S.C. § 1404(a) is hereby **DENIED**.

III. Summary Judgment Standard

The Seventh Circuit stated the standard for summary judgment in *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

> Fed. R. Civ. P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." When the facts are disputed, the parties must produce proper documentary evidence to support their contentions, and may not rest on mere allegations in the pleadings, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983), or upon conclusory statements in affidavits. *First Commodity Traders v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985). In reviewing a grant of summary judgment, all reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Matsushita Elecs. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). . . . The mere existence of a factual dispute will not bar summary judgment unless "the disputed fact is outcome determinative under governing law." *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983).

Id. at 642.

The Supreme Court further clarified the scope of Federal Rule of Civil Procedure 56 in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Celotex*, the Court held that the initial burden is on the moving party to demonstrate "with or without affidavits" the absence of genuine issues of material fact and that, absent such material facts, judgment should be granted as a matter of law in the moving party's favor. 477 U.S. at 323. Once the moving party has met its burden, the opposing party must "go beyond the pleadings" and designate specific facts to support or

defend each element of the claim, demonstrating a genuine issue for trial. *Celotex*, 477 U.S. at 322-23; *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). Not every factual dispute creates a barrier to summary judgment, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

IV. Discussion

As previously noted, the court has fully addressed all of the arguments raised by Davon in its entry in *Templeton Coal*. Consequently, the court will only address those arguments in a cursory fashion in this entry and refer the parties to the *Templeton Coal* entry for further elucidation.

Davon first contends that the Coal Act, as applied to them, violates the Takings Clause because, among other things the Act forces Davon to bear a burden which should be borne by the public as a whole. This argument must fail for the reasons set forth in *Templeton Coal* at pp. 40-52. Davon further argues that the Coal Act, as applied to them, violates the Due Process Clause, because, among other things, it is a retroactive statute as applied to Davon and is arbitrary and has no rational basis. This argument must also fail for the reasons stated in *Templeton Coal* at pp. 16-40.

The court finds that Davon is situated identically to Plaintiff Templeton Coal in *Templeton Coal* in that both corporations, having been signatories to the 1952 NBCWA, exited the coal business in 1954, never to

engage in that business again. *See Templeton Coal* at 3. As a result, Davon's challenge to the constitutionality of the Coal Act must fail for the same reasons fully explored in *Templeton Coal*. Accordingly, Davon's motion for summary judgment is hereby **DENIED** and Defendants' cross-motion for summary judgment is hereby **GRANTED**.

V. Conclusion

For the reasons stated above and in the court's summary judgment entry in *Templeton Coal*, the court finds as follows: (1) Defendant Combined Fund's motion to transfer venue is hereby **DENIED**; (2) Plaintiff Davon's motion for summary judgment is hereby **DENIED**; and (3) Defendants' cross-motion for summary judgment is hereby **GRANTED**. Judgment will be set forth in a separate order accompanying this entry.

ALL OF WHICH IS ORDERED this 4th day of April 1995.

/s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court